UNITED STATES
v.
WILLIAM J. BARTELS, SR., ET AL.

IBLA 70-210 Decided June 5, 1972

Appeal from decision in Oregon Contest 02742 by the Bureau of Land Management, which affirmed a departmental hearing examiner's decision rejecting mineral patent application and declaring mining claims null and void.

Affirmed.

Mining Claims: Discovery: Generally -- Mining Claims: Discovery: Geologic Inference

To constitute a discovery upon a lode mining claim there must be a discovery on the claim of a lode or vein bearing mineral which would justify a prudent man in the expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine; it is not sufficient that there is only a showing which would warrant further exploration in the hope of finding a valuable mineral deposit.

Mining Claims: Discovery: Generally -- Mining Claims: Discovery: Geologic Inference

Geologic inference may be relied upon to establish the extent and potential value of a particular mineral deposit but it may not be relied upon, as a substitute for the actual finding of a mineral deposit, to establish the existence of the deposit within the limits of a designated mining claim; and, where a vein carrying some erratic values in mineralization has been exposed within the limits of a mining claim, but the exposed mineralization does not constitute a mineral deposit capable of development and the existence of such a deposit in the vein within the limits of the claim can only be inferred, a discovery, within the meaning of the mining laws, has not

been shown and an application for patent is properly rejected and the claim declared null and void.

Mining Claims: Determination of Validity -- Mining Claims: Discovery: Generally -- Mining Claims: Patent

APPEARANCES: Herbert W. Lombard, Jr., of counsel, for appellant Lane Minerals, Inc.; Sidney E. Thwing for appellants William J. Bartels, Sr., et al.; Arno Reifenberg, Office of the General Counsel, United States Department of Agriculture, for the United States.

OPINION BY MRS. LEWIS

William J. Bartels, Sr., et al., 1/ have appealed to the Secretary of the Interior from a decision by the Chief, Branch of Mineral Appeals, Office of Appeals and Hearings, Bureau of Land Management, dated May 28, 1970, affirming a hearing examiner's decision of April 30, 1963, which declared 13 lode mining claims 2/ located within secs. 11, 12, 13, and 14, T. 23 S., R. 1 E., W.M. Lane County (within the Umpqua National Forest), Oregon, to be null and void and rejected their mineral patent application Oregon 02742.

After a thorough review of the entire case record and the governing law, we agree with the decision below. We, therefore, adopt the Bureau's decision, a copy of which is attached, with the addition hereinafter set forth.

Appellants have advanced substantially the same contentions and arguments in their appeal to the Secretary as they did in appealing to the Director of the Bureau. These contentions and arguments were effectively answered in the attached decision.

We will stress one point that goes to the crux of the case. As we read the evidence the appellants have not contended that there

1/ The remaining appellants-contestees are Julia A. Bartels, William J. Bartels, Jr., Kathryn A. Bartels, Harriet A. Bartels, and Lane Minerals, Inc.

2/ The 13 claims involved are the Bertha, Frank Brice, Good Hope, Jumper, Mable, Oversight, Ruth, Sunrise, Sunrise Fraction, Surprise, Vindicator, Webfoot, and West Annie lode mining claims.

is a lode or vein exposed on any of the claims carrying mineral values which would justify undertaking a mining operation with a reasonable prospect of success in developing a valuable mine. Instead they rely entirely on geological inference based upon the history of the mining district, increase in mineral values at depth, and the projection into the claims of veins from adjoining mines in the area with extensive underground development that have been good producers.

Such reliance on geological inference cannot serve as a substitute for an actual physical exposure of a mineral deposit within the limits of a claim sufficient to constitute a valid discovery under the mining laws. Henault Mining Company v. Tysk, 419 F.2d 766 (9th Cir. 1969), cert. denied, 398 U.S. 950 (1970). Furthermore, we note that these claims are 66 to 80 years old, and the fact that no one has seen fit to explore the claims at depth during that time would seem to indicate that no one had sufficient faith in the claims to spend his labor and means to explore at depth with the hope of finding an ore deposit which would justify development.

Appellants question the authority of the Bureau to invalidate the claims because of the rejection of the patent application where the claims warrant further development [exploration]. Since its decision in United States v. Kenneth F. and George A. Carlile, 67 I.D. 417, 427 (1960), the Department has consistently held that the rejection of an application for patent to a mining claim on the ground that no discovery has been made is necessarily a determination that the claim is invalid. This does not necessarily limit a mining claimant in his right to continue to explore for minerals. If the land is still open to mining entry, the claimant is free to continue prospecting on the lands in an effort to find a valuable mineral deposit in accordance with the terms and limitations now governing the location of mining claims.

We find that the arguments raised by the dissent with respect to the Carlile doctrine are not persuasive. The Carlile decision adequately answers the essential thrust of the view of the dissent.

Carlile stated that a mining claim on which no discovery has been made cannot be a valid mining claim. It pointed out that Union Oil Co. v. Smith, 249 U.S. 337 (1919), and many other later cases held that a claim has no validity against the United States until discovery. It concluded that as a matter of logic if a claim is not valid it is invalid.

The essential conclusion that a mining claim cannot be valid without a discovery has been restated by the courts as well as the Department. "Discovery is the sine qua non of an entry to initiate vested rights against the United States." Davis v. Nelson, 329 F.2d

840, 845 (9th Cir. 1964); "* * * that discovery is the prerequisite to the validity of a mining claim cannot be disputed." Fresh v. Udall, 228 F. Supp. 738, 740 (D.C. Colo. 1964).

"A mineral discovery upon a claim is the sine qua non for its validity; and although location of boundaries and monuments upon the ground may precede discovery or discovery may precede such location so long as intervening rights are not affected, it is essential to validate it that mineral discovery be within the limits of the claim located." Ranchers Exploration and Development Co. v. Anaconda Co., 248 F. Supp. 708, 714 (D.C. Wash. 1965). See also United States v. Ed Bergdal, 74 I.D. 245 (1967); United States v. Baranof Exploration and Development Co., 72 I.D. 212 (1965).

A text states:

> "A valid mining location cannot be made without a discovery of minerals within the limits of the claim." 1 Am. Law of Mining, sec. 4.13 and cases cited n.2.

How then can a claim that is not valid or has no validity be other than invalid? To say that claims whose validity has not been determined are neither valid nor invalid is to transmute a question of fact into one of law. A claim is either valid or invalid upon its facts. The only unresolved question is not the status of the claim, but of the facts that determine into which category it falls. As Carlile explained, when the requirement essential to the validity of claim is found to be lacking, the claim is invalid.

We add only that the dissent recognizes the doctrine of pedis possessio mentioned in Carlile but offers no explanation or support for the assertion that a failure to declare the mining claim null and void helps the claimant's "posture" under that doctrine. Also, the dissent's arguments based on the contest complaint form and special statutes pertaining to mining claims are non sequiturs. The fact that the Department's formal mining contest complaint sets forth two items for relief has no significance since the form is used both where a mineral patent application has been filed (establishing a mineral entry which must be cancelled) and where no such application has been filed and where the only relief would be a declaration that the claim is null and void. As to the special statutes referred to by the dissent, they present a much stronger argument in favor of the Carlile rule than may be made from them otherwise because Congress created special circumstances where a claim would not be declared null and void following a determination of no discovery.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081), the decision appealed from is affirmed.

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Anne Poindexter Lewis, Member

We concur:

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Martin Ritvo, Member

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Joan B. Thompson, Member

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Joseph W. Goss, Member

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Edward W. Stuebing, Member

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Newton Frishberg, Chairman

In Reply Refer to:
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Contest No. 02742 Oregon

May 28, 1970

CERTIFIED MAIL
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DECISION

United States of America, Contestant	:	Involving Bertha, Frank Brice, Good Hope, Jumper, Mable, Oversight, Ruth, Sunrise, Sunrise Fraction, Surprise, Vindicator, Webfoot, and West Annie lode mining claims, situate in sections 11, 12, 13, and 14, T. 23 S., R. 1 E., W.M., Lane County, Oregon, within Umpqua National Forest.
v.	:	
William J. Bartels, Sr., Julia A. Bartels, William J. Bartels, Jr., Kathryn A. Bartels, Harriet A. Bartels, Lane Minerals, Inc., Contestees	:	

Decision Affirmed

An appeal has been taken by the contestees from the Hearing Examiner's decision of April 30, 1963, which declared the Bertha, Frank Brice, Good Hope, Jumper, Mable, Oversight, Ruth, Sunrise, Sunrise Fraction, Surprise, Vindicator, Webfoot, and West Annie lode mining claims null and void for the reason that each claim lacked a valid discovery of a valuable mineral deposit within the meaning of the mining laws.

Following examination of the claims in connection with application for mineral patent, Oregon 02742, 1/ the Regional Forester, Forest Service, U.S. Department of Agriculture, Portland, Oregon, requested initiation of a contest against the 13 lode mining claims above-listed, alleging (1) that minerals have not been found within the limits of each claim in sufficient quantities to constitute a valid discovery, and (2) that the statutory expenditures required in patent proceedings have not been made within the limits of or for the benefit of the Frank Brice, Surprise, and West Annie lode mining claims (43 CFR 185.42, now 43 CFR 3441.2). Timely answers from the above-named contestees denied the allegations so a hearing was held on July 24, 25, 26, and 27, 1962, at Eugene, Oregon. The contestant was represented by Arno Reifenberg,

1/ Application for mineral patent Oregon 02742 named 25 lode mining claims when first filed on April 3, 1953. Subsequently 8 claims were withdrawn from the application, and 4 claims, Broadway, Champion, Diamond, and Excelsior lode mining claims, were included in patent 1227644 issued July 9, 1962. The remaining 13 claims are included in this contest proceeding.

Office of the General Counsel, U.S. Department of Agriculture; the contestees Bartels' were represented by Richard L. Thwing, attorney at law, and the contestee Lane Minerals, Inc., was represented by Herbert W. Lombard, Sr., and Herbert W. Lombard, Jr., attorneys at law. Testifying for the contestant were Milvoy M. Suchy, a mining engineer employed by the Forest Service, and Charles R. Garrett, Jr., and George S. Neuberg, mining engineers employed by the Bureau of Land Management, each qualified as an expert witness; testifying for the contestees were Harold E. L. Barton, a qualified mining engineer, and Kenneth O. Watkins, a mine operator.

The record shows that the contested claims were originally located in the period between 1890 and 1904. They are in the Bohemia mining district, in sections 11, 12, 13, and 14, T. 23 S., R. 1 E., W.M., Lane County, Oregon, and within the Umpqua National Forest. Each claim was amended by a notice dated September 3, 1904, and each is delineated on Mineral Survey 610 (Oregon).

Testimony given at the hearing is reported in detail in the Hearing Examiner's decision, so it need not be repeated here. Essentially, the witnesses for the contestant described the geology of the Bohemia mining district generally and its past production records, as well as a detailed description of the host rock and the mineral veins present on each of the 13 contested claims individually. Certificates of assays of the many samples taken by each examiner were introduced. Although samples taken by Suchy in 1954 showed very high values for gold and silver, none of the subsequent samples taken in 1960 and 1962 approached the earlier values, so each of the witnesses, Suchy, Garrett and Neuberg, expressed the opinion that the mineral values were very erratic in their occurrence, and that there is no evidence of sustained mineralization in any of the veins exposed in the claims. Each of these witnesses gave his considered opinion that the mineral occurrence in the veins was so slight that a prudent man would not be justified in expending further time or money in hope of developing a valuable mine. Each testified that he thought the mineral values would not increase at depth because the host rocks were different from those observed to carry valuable ore in the underground workings of adjacent mines. Neuberg presented a study on the cost of mining and milling ore in the Bohemia mining district, and testified that, in his opinion, the cost of production of the exposed ore on the 13 claims would greatly exceed the mineral values to be recovered.

Watkins testified for the contestee that his experience as a miner in the Bohemia district showed that the mineral values increased with

depth, citing the adjacent Musick mine as an example, so that he considered the presence of veins at the surface of the 13 claims was sufficient justification for a prudent man to explore deeper. Barton testified that the general geology of the 13 claims compared favorably with that present in the producing mines in the Bohemia district, but he admitted there were distinguishable differences in the host rock, and that none of the claims had any grandiorite exposed, grandiorite being a predominate carrier of values in the neighboring mines.

He was unaware of any secondary enrichment within the area of the 13 claims, but he thought that the claims, as a group, presented an opportunity for profitable development by a prudent man. Certificates of assays of samples taken by Barton consistently reflected values in the range of the samples taken by Garrett and Neuberg. None of the 13 claims was reported as having any production of mineral in the past, although it was stated that a minor amount of gold has been "high-graded" from the Bertha claim.

In their appeal the contestees contend that basic errors were made by the Hearing Examiner in evaluating the evidence presented at the hearing, and that his conclusion that there have been no discoveries on the 13 contested claims is incorrect.

Specifically, the contestees assert that the decision is in error in that it states, on page 3, that the North-South striking structures do not show any continuity or width where exposed. An examination of the decision discloses, however, that the Hearing Examiner was referring to the mineralization in the structures rather than to the structures themselves. The decision states, on page 3, "Mineralization in the North-South striking structures did not show any continuity of width where exposed." (Emphasis supplied.)

The contestees also assert that the Hearing Examiner erred in concluding, on page 3, that no extensive exploration or development work has been conducted for the improvement of the North-South structures, arguing that the deep development of the Champion, War Eagle and West Musick tunnels all contribute to the development of the North-South veins. While it may be assumed, arguendo, that the deep development of the Champion, War Eagle and West Musick tunnels might incidentally contribute to the development of any North-South structures which may be found within the limits of the 13 contested claims, there is nothing in the record to show that any extensive exploration or development work has been done specifically for the improvement of these structures. Barton testified that he felt the contested claims could be developed

from the 1200 level of the Champion workings by prosecuting deep tunnel work in the vicinity of known ore bodies and working from them in the general development of the area. (Tr. 549-551).

Next, the contestees contend that the Hearing Examiner erred, on pages 3 and 8 of the decision, in stating that all the production of the district had been from East-West structures. They contend that Watkins testified, on a page in the transcript which they failed to identify, of production from the Johnson cross-vein, a North-South structure on the Champion group. A review of the record reveals that Watkins testified as follows regarding production from a shaft on the Bertha claim:

> "There are two or three shafts on the Bertha. If you're referring to the one on the old Colorado road, a man by the name of Harold Kirschner (phonetic), who worked for me at the Musick Mine in '36 -- in '35 and '36, even though it was on the Champion ground, he located a claim, not realizing he was on Champion ground, and did some digging there and he had a mine production by hand because he brought the gold back in a packsack, and he picked up a little mortar and panned it at the Musick bunkhouse, * * *. I don't know how much he got. I saw his gold. I know he was getting high grade gold, just rich enough that he could beat it out with a mortar and pan it out." (Tr. 408, and see also Tr. 439).

Watkins later testified that the Bertha vein and the Johnson vein are one and the same. (Tr. 446). There is no further testimony by Watkins referring to production from the Johnson vein. Barton testified that the Bertha vein is small but persistent, although he was unable to get any high assays from it. (Tr. 515, 516).

Consideration of this testimony leads us to concur with the contestant that this production is so insignificant that it does not affect the validity of the Hearing Examiner's observation that the production of the Bohemia district has been from East-West structures. The contestant also notes in its answer that it is significant that the contestees were able to cite only one spot in the entire district where production is supposed to have taken place on a North-South structure.

The contestees contend that the Hearing Examiner erred in concluding that the intersection of the California vein with the Johnson and War Eagle veins did not produce any increase in mineral values, arguing that the values existing at these points of intersection were unknown to the mineral examiners, and that geological reports indicate enhanced values

at these points. While it is true that Garrett and Barton each testified that a junction or intersection of veins is a very favorable area for finding valuable minerals (Tr. 305, 519), neither testified of any appreciable increase in mineral values at the intersection of the California vein with either the Johnson or War Eagle veins. Garrett testified that he did not recall seeing anything on any of the contested claims to indicate that such a condition existed on those claims (Tr. 305). Barton testified that he does not think the intersection of veins is a controlling factor in many instances. He stated that, while the ore deposit did not entirely concentrate around the intersection of the California and Musick veins, he thinks there "probably was some sort of relationship." (Tr. 519). He testified that there are two other minor intersections of the Johnson cross-vein, one of which, he stated, "apparently developed some production," as testified by Watkins. Barton stated that the other intersection is in the vicinity of the discovery cut on the Bertha claim, but that the actual point of intersection is not observable, and that he could not see that it particularly influenced the vein (Tr. 520). He concluded that "in a general way these intersections may well indicate the general presence of mineralization dispersed throughout the area which would be concentrated with depth around dioritic intrusives." (Tr. 521).

The contestees contend the Hearing Examiner erred in stating that the underground workings of the Champion, Helena and Musick mines revealed that where the mineralized structures enter the highly altered, metamorphosed, brecciated zones they became lost or almost undiscernible and barren of mineralization. They assert that the evidence shows that some of the better ore shoots of the Champion mine occurred in an altered breccia zone, and that experience in the Bohemia district has shown that ore shoots occur intermittently in all types of rocks. They state that there is, however, a basic similarity of the productive claims of the Champion Group and the 13 contested claims. The contestees also contend that good ore shoots have been found in relatively flat-lying veins and in wide veins with loose walls, and are not, as the decision states, confined to areas where "the attitude of the structures are steep and confined to narrow, tight walls * * *." We are unable to agree the Hearing Examiner erred in this matter for the following reasons: the contestees have not referred to, nor have we been able to find, any evidence of record to support their statement that the record shows that some of the better ore shoots in the Champion mine occur in a highly altered, metamorphosed, brecciated zone, or that good ore shoots have been found in relatively flat-lying veins and in wide veins with loose walls. Moreover, a careful reading of the record discloses that the Hearing Examiner based his finding that the

underground workings of the Champion, Helena and Musick mines became lost or almost undiscernible and barren of mineralization where they enter highly altered, metamorphosed, brecciated zones, on the information contained on pages 14 and 15 of the report compiled by Garrett and Neuberg during their 1960 examination of the contested claims, a report received in evidence at the request of the contestees. (Tr. 667, 720).

In connection with the similarity of the geology of the contested claims and that of producing mines in the district, Neuberg and Garrett testified that the host rock in the Champion mine is dioritic andesite (Tr. 174, 288). Barton testified that rhyolite and altered leached tuff breccias are also present (Tr. 494). Neuberg and Garrett believe the host rock in the Musick mine to be rhyolite flows (Tr. 174, 289), while Barton stated that tuff breccia, in addition, is found there (Tr. 494). On cross examination, Barton stated that U.S. Geological Survey Bulletin 893 shows that the workings of the Musick mine are in rhyolite and andesite and that tuff breccia is only present at a cross-cut (Tr. 621). Neuberg believes that dioritic andesites are present in the Helena mine (Tr. 174). Garrett called the rock unaltered andesite (Tr. 288). Barton said the host rock was grandiorite sometimes, but also andesite (Tr. 493). Exhibit B, submitted by the contestees, shows both the Champion and the Helena mines to be in an area of dioritic intrusive rocks. Neuberg testified that the host rock on the 13 claims is unlike the host rock on the Champion, Musick and Helena mines. He states that the host rock on the 13 claims was examined by him and Garrett under a microscope, and that they found it to be predominantly altered brecciated andesite and tuff (Tr. 169, 174, 226). Barton testified that the geology in the area of the 13 contested claims is similar to that of the producing areas (Tr. 496), but he conceded that the 13 claims are not in grandiorite according to Exhibit B (Tr. 622).

The contestees' appeal includes the contention that the Hearing Examiner erred in concluding that "the mineralization of zones which have been mined consisted chiefly or primary sulfides and small amounts of their alteration products." They argue that during the years of heaviest production from this area the primary minerals extracted were gold and silver. They state that below the zone of oxidation moderate enrichment of the primary sulfides has been shown to exist in the district as a whole and that deep mining in the district has demonstrated this increase in value at depth. They also state that it has been shown that there have been found at depth intermittent zones rich in gold content, and that there is a general increase at depth in the value of the base metals.

Consistent with the contestees' assertion, the Hearing Examiner found, on page 4 of his decision, that minerals, "primarily gold from the oxidized upper portions of the veins, were produced beginning in 1858 * * *." There is, however, nothing in the record to support the conclusion that there is a general increase in mineral values at depth in the area. Barton testified that he found only one place in the entire area where he saw any secondary enrichment, in a section of the Champion mine (Tr. 617), and that sulfide enrichment is not a major factor in this district (Tr. 614). Neuberg believes that he could not find higher values with greater work in the area of the contested claims, and that the structures at depth will be the same as on the surface (Tr. 181, 182). Garrett agrees that better values could not be found with more work (Tr. 298). He stated that the structures on the claims show no persistency with depth, and that the veins have doubtful continuity (Tr. 299). Suchy testified that he had seen no enrichment elsewhere than one place in the Champion mine (Tr. 18. 19).

The contestees allege that the Hearing Examiner considered the assay value of surface exposures as the primary element in coming to his decision. The decision contains, however, discussions of the geological features of the Bohemia mining district, and the contested claims in particular, the production history of the district, and other relevant factors. The decision also contains a discussion of each claim in which the strength or weakness of the structures found on the individual claim is analyzed.

In connection with the above, the contestees note that while the Hearing Examiner refuses to use inference at depth in connection with the contested claims, two of the claims included in the original patent application, the Diamond and the Excelsior claims, were clear-listed solely on inference of increased values at depth. In its answer to the contestees' appeal brief, the contestant submits that this is not an accurate statement.

The contestant points out that the Diamond and the Excelsior claims are discussed in the 1960 report submitted by Garrett and Neuberg, Exhibit R. At page 29 of the report, it is stated that the samples taken by the examiner did not establish a discovery for the Diamond claim. The report continued, however, that:

> "* * * it is the opinion of the undersigned examiners, based upon sample records and assay results, that a valid discovery has been made on the Champion vein for the Diamond lode mining claim in the underground workings of the Champion mine." (Emphasis added.)

At page 30 of Exhibit R, it is stated that underground workings have penetrated the area of the Excelsior claim, workings which have all had production. The report states:

> "Assay records show blocked out low grade milling ore still remaining in the Champion vein between the 600 level and the 900 level within the confines of this uncomplicated area of the Excelsior mining claim."

Thus, the Excelsior claim was clear-listed not only because of strong geologic inference but also because of assay results indicating the existence of low grade milling ore within the confines of the claim. When Neuberg was asked whether he used inference in clear-listing the Excelsior claim he answered no, and that he thinks the Evening Star tunnel hits the Champion vein and goes into the southeast corner of the Excelsior claim. (Tr. 233, 234).

The contestees next contend that Exhibits 7 and 8, pictures taken in the area of the Champion vein (Tr. 151), show nothing more than holes in the ground and are not specific evidence of the width of the mineralized surface outcrops of producing veins. The record discloses, however, that Neuberg testified that while the vein cannot be seen in Exhibit 7 due to the caved, sloughed condition of the area (Tr. 152), it is discernible on Exhibit 8, where it shows the vein to be approximately two and a half or three feet wide (Tr. 153). Moreover, Neuberg also testified that he observed the strength of the structures while walking across the surface of the producing mines (Tr. 175), and that the average width of the Champion vein is two and one half feet in the exposures that he has seen of that vein (Tr. 161).

The contestees assert they are being deprived of a valuable property right without due process of law because the Government has depressed the value of gold by fixing its price and then declared their claims null and void because they cannot be commercially developed at the present time. In its answer, the contestant asserts that this argument has been considered and rejected by the courts in such cases as Laycock v. Kenney, 270 F.2d 580 (9 Cir. 1959).

We find this argument of the contestees to be without merit. The general question of taking property without due process of law in the establishment of restrictions on the sale of newly-mined gold was considered in Laycock v. Kenney, supra, where the Court held that the

appellant's right to mine and dispose of gold from her property was not restricted by Congressional establishment of rules curtailing free sale of gold, and that no property had been taken from her by such action. See also United States v. Irving Rand and John M. Balliet, A-30036 (October 19, 1964). Furthermore, the contestees were not required to show that the minerals they allege to have found on the claims may be profitably removed at the present time. See United States v. Santiam Copper Mines, Inc., A-28272 (June 27, 1960).

The contestees contend that the Hearing Examiner erred in relating all values on the contested claims to values, mining and milling costs, and economic conditions existing at the time of the hearing. They argue that the validity of the discovery is determined as of the date of the original discovery and not at the time the Government sees fit to hold a hearing. Before a mining claim may be patented, the claimant must show that the claim is valuable for minerals at the time of the application for patent. United States v. Margherita Logomarcini, 60 I.D. 371 (1949); Best v. Humboldt Placer Mining Company and Del de Rosier, 371 U.S. 334 (1963). It is our opinion that the cost and value figures adduced at the hearing were substantially those prevailing at the time the application for patent was submitted.

In addition to the several specific allegations of error discussed above, the contestees assert, generally, that the Hearing Examiner erred in his evaluation of the evidence and in concluding that no discoveries had been made on any of the contested claims. We have carefully reviewed all of the evidence submitted during the course of the hearing and find substantial support for his conclusions in the record.

The establishment of a valid lode mining claim is contingent upon the "discovery" of "veins or lodes" containing "valuable [mineral] deposits" within the limits of the claim. 30 U.S.C. § 22, 23 (1964). Under the mining laws one may take possession of vacant public land open to location under those laws and, after filing notice of location, retain possession against all, except the Government, while he is in diligent prosecution of his efforts to discover valuable minerals therein, but, when the Government withdraws its consent to such location, either by withdrawing the land from the operation of the mining laws or by institution of adverse proceedings against a mining claim, the locator must show that he has made a discovery of valuable mineral deposits within the limits of the claim in order to retain possession. United States v. Everett Foster et al., 65 I.D. 1 (1958), affirmed in Foster v. Seaton 271 F. 2d 836 (D.C. Cir. 1959).

When the Government contests a mining claim on public lands, it bears only the burden of going forward with sufficient evidence to establish a prima facie case; the burden then shifts to the mining claimant to show by a preponderance of the evidence that this claim is valid. Foster v. Seaton, supra.

The legal requirement for maintaining a mining claim must be fulfilled by the claimant making a discovery of a valuable mineral deposit whose existence is in such condition that the Government may confirm it by an examination. See Henrikson et al., v. Udall, et al., 229 F. Supp. 510 (D.C. N.D. Cal. 1964), affirmed 350 F.2d 949 (9 Cir. 1965), rehearing denied October 28, 1965, cert. denied, 380 U.S. 940 (1966). The dispute in this case centers on the meaning of the concept of "discovery" under the mining laws and on the sufficiency of the evidence of discovery of a valuable mineral deposit. The parties agree that discovery of a valuable mineral deposit is essential for a valid mining claim. It is obvious, however, that the contestee has a different concept of "discovery" from that used by the Hearing Examiner.

The view of the appellants appears to be that the test of a discovery is satisfied if the evidence of mineralization on a mining claim is such that a prudent man would be justified in the expenditure of money and effort in exploring the mineral potential with a reasonable expectation that such exploration would lead to the development of a profitable mine. Under the concept employed by this Bureau, the test of what a prudent man would or would not be justified in doing cannot be applied until a mineral deposit has been found the development of which can be contemplated. The distinction is significant.

The test of a discovery of a valuable mineral deposit is quite simply stated:

> "(W)here minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of the statute have been met." Castle v. Womble, 19 L.D. 455 (1894); See e.g., United States v. Bryan Gould, A-30990 (May 7, 1969; United States v. Lucille Lundy, A-30724 (June 30, 1967); United States v. Kenneth O. Watkins and Harold E. L. Barton, A-30659 (October 19, 1967).

Approbation to this rule has been given by the Courts on many occasions. See e.g., Chrisman v. Miller, 197 U.S. 313 (1905); Best v. Humboldt Placer Mining Company, supra; United States v. Coleman, 390 U.S. 599 (1968). And where the location is of minerals in a lode or vein, "(T)here must be a vein or lode of quartz or other rock in place; the quartz or other rock in place must carry gold or some other valuable mineral deposit; and the two preceding elements, when taken together, must be such as to warrant a prudent man in the expenditure of his time and money in the effort to develop a valuable mine." Jefferson-Montana Copper Mines Co., 41 L.D. 320 (1912).

Within the concept of the "prudent man rule" also necessarily is profitable marketability of the mineral deposit. As the Supreme Court stated in United States v. Coleman, supra:

> "Under the mining laws Congress has made public lands available to people for the purpose of mining valuable mineral deposits and not for any other purpose. (Footnote omitted.) The obvious intent was to reward and encourage the discovery of minerals that are valuable in the economic sense. Minerals which no prudent man will extract because there is no demand for them at a price higher than the cost of extraction and transportation are hardly economically valuable. Thus, profitability is an important consideration in applying the prudent man test, and the marketability test which the Secretary has used * * * merely recognizes this fact." 390 U.S. at 602.

Through a long line of decisions, the Department has distinguished between "exploration" and "development" as they relate to "discovery" under the mining laws. The Department has held that the showing of mineralization which will justify further exploration may not be adequate to warrant development of a mining claim and that it is only when it can be said that a prudent man would be justified in expending his means in the development of a mineral deposit that a discovery has been made. See e.g., United States v. Laura Duvall and Clifford F. Russell, 65 I.D. 458 (1958); United States v. Clyde R. Altman and Charles M. Russell, 68 I.D. 235 (1961); United States v. Ford M. Converse, 72 I.D. 141 (1965), sustained in Converse v. Udall, 399 F. 2d 616 (9 Circ. 1968), cert. denied, 89 S.Ct. 635 (1969); United States v. Kenneth O. Watkins and Harold E. L. Barton, supra; United States v. Lucille Lundy, supra. In Lundy, the Department stated:

> "There is a clear distinction between 'exploration' and 'development' as they relate to discovery under the mining laws. The

> separate stages of mining activity serve as a basis for determining what further mining activity a prudent man would be justified in undertaking. Exploration work includes such activities as geophysical or geochemical prospecting, diamond drilling, sinking an exploratory shaft or driving an exploratory adit. It is that work which is done prior to a discovery in an effort to determine whether the land is valuable for minerals. When inherently valuable minerals are found, it is often necessary to do further exploratory work to determine whether a valuable mineral deposit exists, i.e., whether the minerals exist in such quality and quantity that there is a reasonable prospect of success in developing a paying mine."

This distinction has been recognized by the Courts also. See e.g., Chrisman v. Miller, supra.

The Department has also refused to accept as the equivalent of discovery deductions or opinions with respect to the existence of valuable mineral deposits which are based upon findings of substantially worthless surface indications of minerals within the limits of a claim or upon the discovery of valuable mineral deposits outside the claim, or which are based upon known geological facts, regardless of the strength of inferences that may arise from the established facts, where the actual body of ore supposed to exist has not been exposed. United States v. Kenneth O. Watkins and Harold E. L. Barton, supra, and cases cited.

When the Government contests a mining claim on public land it undertakes to show that the discernible evidence of mineralization on the claim is insufficient to constitute a discovery. The Government is not obligated to provide affirmative proof that the land within the mining claim is nonmineral or that no discovery has been made. The function of the Government is one of investigation for purposes of verifying, if possible, the claimed discovery. If the Government's examiner testifies that he examined the mining claim and found no workings or evidence of valuable mineral deposits, the Government has established a prima facie case. United States v. Lawrence W. Stevens, 76 I.D. 56 (1969). It is the duty of the mining claimant to keep discovery points available for inspection by the Government's mineral examiner and the examiner has no duty to rehabilitate discovery points or to explore beyond the current workings of the mining claimant. United States v. Bryan Gould, supra.

We recognize that veins have been identified in many of the 13 contested claims, but the testimony of the Government's expert witnesses was to the effect that mineral values present in the veins are too low to

constitute a discovery of a valuable mineral deposit in any of the claims. From this testimony a prima facie case was established, so the burden shifted to the mining claimants to demonstrate by a preponderance of the evidence that they had made such a discovery of a valuable mineral deposit within the limits of each claim. The record does not show that they have done this. Factually, the results of the assays of samples made by the contestees' expert witness were similar in value to those reported by the contestant's witnesses. The principal showing by the contestees was an argument that geological inference should be permitted to postulate the existence of a valuable mineral deposit on each claim, which they expected to be revealed upon further exploration of the veins at depth.

So, it may be said that the mineral showing in the claims is such that a prudent man would be justified in expending further time and money exploring the veins with a reasonable prospect of making a discovery, but it cannot be said that the present showing of mineral values in the claims is such that a prudent man would be justified in expending further time and money with a reasonable prospect to develop a paying mine. It is undetermined whether or not minerals exist in these claims in such quality and quantity as to justify expenditure of money for development of a mine and extraction of minerals. It is the finding of, rather than the undisclosed existence of, a mineral deposit which constitutes discovery.

We do not say that in order to show a discovery a mining claimant must prove conclusively that a particular mineral deposit is valuable for mining. Where ore has been found, the likelihood that ore of the quality found, or of any minable quality, will continue remains a matter for speculation, and, until a mineral deposit has been exploited through actual mining operations, its true value will remain a matter of uncertainty. So, opinions of experts versed in the geology of the area, and deductions from established facts may be, and as a practical matter must be, used to determine whether or not a prudent man would be justified in the expenditure of his means with a reasonable prospect of developing a valuable mine. But while inference may be relied upon to establish the extent of a particular mineral deposit, it may not be relied upon to establish the existence of that deposit. United States v. Watkins and Barton, supra.

The showing thus far made with respect to the 13 contested claims, allowing maximum credibility to the appellants' factual allegations, would require reliance upon inference to establish the existence of an ore body as well as its quantity and quality, and all that the appellants have shown is a possibility that valuable mineral deposits may exist within the limits of the claims.

Accordingly, we concur in the Hearing Examiner's finding that the appellants have not shown the discovery of a valuable mineral deposit within the limits of any of the contested claims, such that a prudent man would be induced to expend time and money with a reasonable prospect of success in developing a valuable mine.

The contest complaint which initiated these proceedings included, in addition to the charge of lack of discovery of valuable mineral deposits on each of the claims, a charge that the $500 statutory expenditure requirement had not been met for the Frank Brice, Surprise and West Annie claims. The Hearing Examiner concluded that, as the claims were null and void for lack of discovery, there was no need to rule on this charge. The contestees assert that the Hearing Examiner erred in failing to rule on this charge.

As a finding that all of the contested claims are null and void for lack of discovery renders moot the question of statutory expenditures, we agree with the Hearing Examiner that a discussion and ruling on the second charge is unnecessary.

The Hearing Examiner's decision is affirmed.

The contestees named above have the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken, it must be filed with the Director, Bureau of Land Management, Washington, D.C. 20240. The filing fee will be computed on the basis of $5 for each mining claim included in the appeal. If the appeal covers all 13 mining claims adversely affected by this decision, the total filing fee will be $65. In taking an appeal there must be strict compliance with the regulations. The appellants must show wherein the decision appealed from is in error. If an appeal is taken, the adverse party to be served is Regional Attorney, Office of the General Counsel, U.S. Department of Agriculture, 310 Multnomah Building, 319 S.W. Pine Street, Portland, Oregon 97204.

Chief, Branch of Mineral Appeals
Office of Appeals and Hearings

Enclosures 2

Frederick Fishman, dissenting in part.

I question the doctrine enunciated in United States v. Carlile, 67 I.D. 417 (1960), used and cited with approval in the main opinion.

Carlile holds that there is no reasonable or logical basis for the Department's practice in some mining contests involving applications for patent to reject the application for lack of discovery on the claim and to permit the claim to remain in existence.

The following sets forth the pertinent conclusions embodied in Carlile at 67 I.D. 426-7:

> It seems impossible to avoid the conclusion from the Clipper Mining Company [1/] that the mere rejection of a patent application for lack of discovery does not, by itself, invalidate the mining claim and that it is within the authority of the Secretary, in a patent proceeding, to decide just how far to go, whether to invalidate the claim as well as to reject the patent application or only do the latter.
>
> It appears equally impossible, however, to reconcile the Clipper ruling with the later pronouncements by the Supreme Court in Union Oil Co. v. Smith, supra, [2/] decided 15 years after the Court's decision in the Clipper case. Union Oil plainly states that until discovery a mining claimant has no rights against the United States or in the land in the claim. If, then, in a direct proceeding against a patent application the Department finds that no discovery has been made, it is impossible to see how the claim can survive as a valid mining claim despite the fact that the Department purports only to reject the patent application. I am not aware that, save for such implication as may exist in the Clipper cases, any different standard of discovery has been required to sustain the validity of a claim merely because a patent is applied for. A claimant cannot rely upon a lesser discovery to sustain the validity of his claim than is necessary to entitle him to a patent.

1/ Clipper Mining Co. v. Eli Mining and Land Co., 194 U.S. 220 (1904); Clipper Mining Company, 33 L.D. 660 (1905) and 22 L.D. 527 (1896); Searle Placer, 11 L.D. 441 (1890).
2/ 249 U.S. 337 (1919)

To put it another way, in order, as in this case, to reject an application for patent on the ground of lack of discovery, the Department must find that there has not been found a valuable mineral deposit of such character that a person of ordinary prudence would be justified in the further expenditure of his labor and means with the reasonable prospect of success in developing a valuable mine. But if the Department so finds with respect to a claim, it seems it has necessarily found that there is no discovery to give the claim validity.

A mining claimant has the ultimate burden of establishing by a preponderance of the evidence that his claim is valid. Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959). If upon application for patent he is unable to prove that he has made a valid discovery, there seems to be no logical basis for holding that, although he must be refused a patent because of lack of discovery, nevertheless his claim will still be considered to be a valid claim.

It is my conclusion, therefore, that the ruling in the Clipper Mining Company cases should no longer be regarded as sustainable, in view of the decision in Union Oil Co. v. Smith and the numerous later cases that clearly and unequivocally hold that a claim has no validity in the absence of a discovery, and should no longer be followed.

* * * * * * *

To summarize up to this point, it is my opinion that where in a contest against a mining claim it is found that a valid discovery has not been made, it necessarily follows that the claim is invalid, or null and void, without regard to whether the contest was brought as the result of an application for patent or in the absence of an application for patent. The consequences of the invalidation are as described earlier.

That Union Oil decided that until discovery a mining claimant has no rights against the United States or in the land in the claim does not compel the conclusion that the mining claim must be declared null and void. Union Oil simply means that such a claimant has no rights he can enforce 3/ against the United States. Union Oil does

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3/ However, Union Oil at 346-348 holds that such a mining claimant has rights he can enforce against others:

"* * * Those who, being qualified, proceed in good faith to make such explorations and enter peaceably upon vacant lands of the United States for that purpose are not treated as mere trespassers, but as licensees or tenants at will. For since, as a practical matter, exploration must precede the discovery of minerals, and some occupation of the land ordinarily is necessary for adequate and systematic exploration, legal recognition of the pedis possessio of a bona fide and qualified prospector is universally regarded as a necessity. It is held that upon the public domain a miner may hold the place in which he may be working against all others having no better right, and while he remains in possession, diligently working towards discovery, is entitled -- at least for a reasonable time -- to be protected against forcible, fraudulent, and clandestine intrusions upon his possession. Zollars v. Evans, 5 Fed. Rep. 172, 173; Crossman v. Pendery, 8 Fed. Rep. 693, 694; Johanson v. White, 160 Fed. Rep. 62, 65; Gemmell v. Swain, 28 Montana, 331, 335; New England &c. [sic] Oil Co. v. Congdon, 152 California, 211; Whiting v. Straup, 17 Wyoming 1, 19, 23; Phillips v. Brill, 17 Wyoming, 26, 38. [Footnote omitted.]

* * * *

"In the California courts the right of a locator before discovery while in possession of his claim and prosecuting exploration work is recognized as a substantial interest, extending not only as far as the pedis possessio but to the limits of the claim as located; so that if a duly qualified person peaceably and in good faith enters upon vacant lands of the United States prior to discovery but for the purpose of discovering oil or other valuable mineral deposits, there being no valid mineral location upon it, each person has the right to maintain possession as against violent, fraudulent, and surreptitious intruvoring to discover mineral thereon. Miller v. Chrisman, 140 California, 440, 447 (case affirmed 197 U.S. 313); Weed v. Snook, ubi supra [144 Cal. 439]; Merced Oil Mining Co. v. Patterson, 153 California, 624, 625; 162 California, 358, 361; McLemore v. Express Oil Co., 158 California, 559, 562."

not militate against the conclusion that the United States may permit such a claimant to remain on the land as a tenant by sufferance or tenants at will. 4/

Carlile states that if in a direct proceeding against a patent application the Department finds that no discovery has been made, it is impossible to see how the claim can survive as a valid mining claim if the patent application is rejected on the basis of lack of discovery.

This assumes that a claim is either valid or invalid. This assumption, in my opinion, is demonstrably erroneous and is based upon a false dichotomy. 5/ There are literally hundreds of thousands

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4/ See note 3/ and 4 LAND AND WATER L. REV. 337 (1969).

It is noteworthy that in United States v. Josephine Lode Mining and Development Company, A-27090 (May 11, 1955), Solicitor Armstrong cited Union Oil in support of the proposition that "* * * notwithstanding the fact that the application for a patent must be rejected, the company may, so long as the land remain unappropriated to other purposes by the Government, continue its possession of the claims while it is engaged in persistent and diligent prosecution of work looking to the discovery of valuable mineral deposits."

5/ This concept does not accord with the Multiple Mineral Development Act, 30 U.S.C. §§ 521-531 (1970) or the Surface Resources Act, 30 U.S.C. §§ 601-615 (1970), as pointed out below.

The sanction imposed, for failure to show a discovery in a hearing pursuant to 30 U.S.C. § 613(c) (1970) [commonly called P.L. 167], is a reservation to the United States prior to patent "to manage and dispose of the vegetative surface resources * * * and to manage other surface resources. * * *" 30 U.S.C. § 612(b) (1970).

Similarly, under 30 U.S.C. § 527(c) (1970) [sometimes called P.L. 585], a hearing, commenced at the behest of a mineral lease applicant, offeror, permittee or lessee, in which the mining claimant fails to demonstrate a discovery of a valuable mineral, results only in the claimant's being deprived of his interest "* * * in Leasing Act minerals. * * *"

Cf. United States v. Joseph Frederick Thompson, A-23511 (January 19, 1943), in which a mineral patent was denied on the basis of no discovery but no action was taken to declare the claim null and void.

of mining claims on the public lands, whose validity has not been ascertained. They are properly described as "subsisting" mining claims or as "unpatented mining claims". See S. REP. No. 1984, 87th Cong., 2nd Sess. 4 (1962), culminating in the Act of October 23, 1962, 30 U.S.C. §§ 701-709 (1970), both of which recognize the latter term.

The misconception that a claim must either be valid or invalid persists throughout the quoted material. It would be supererogation to discuss specifically further examples of the same reasoning employed in Carlile.

Concededly, the Department has authority to declare a mining claim null and void for lack of discovery. Cameron v. United States, 252 U.S. 450 (1929). My point is that the Department is not required to take that action when it finds insufficient evidence of discovery to support a patent application. There is another approach, set forth below, which indicates that even though the patent application is rejected for lack of a discovery, the mining claim may be permitted to remain in esse.

The contest notice, issued September 22, 1961, in the case at bar states in pertinent portion:

> 5. Contestant charges separately and collectively that:
>
> (a) Minerals have not been found within the limits of each claim in sufficient quantities to constitute a valid discovery;
>
> (b) The statutory expenditures required in patent proceedings have not been made within the limits of or for the benefit of the Frank Brice, Surprise, and West Annie lode mining claims (43 CFR 185.42).
>
> Wherefore, Contestant requests that it be allowed to prove its allegations and that one, or both, of the following actions be taken, as indicated.
>
> 1. [X] The Mineral entry be cancelled.
>
> 2. [X] Said Mining Claims be declared null and void.

If the conclusion in Carlile is deemed to be correct, then based upon charge 5(a), the rejection of the patent application [i.e. the cancellation of the mineral entry] would necessarily compel the declaration of the mining claims as null and void. Apart from the consideration that Carlile has not permeated the formulation of contest complaints, there would be no necessity for the first prayer for relief.

The Department of the Interior acts in a quasi-judicial capacity, i.e. "* * * a special tribunal" in determining whether claims under the U.S. mining laws are to be granted or denied. Best v. Humboldt Placer Mining Co., 371 U.S. 334 (1963); Cameron v. United States, 252 U.S. 450 (1920); United States v. Schurz, 102 U.S. 378 (1880); Adams v. United States, 318 F.2d 861 (9th Cir. 1963).

It seems crystal clear that a court, or an administrative body acting in a quasi-judicial capacity, even where the moving party has proved his case, need not necessarily grant all prayers for relief. Indeed, Carlile adverts to decisions where the mineral patent applications were rejected, but the mining claims were left in existence, e.g. Josephine Lode Mining and Development Company, A-27090 (May 11, 1955); United States v. Margherita Logomarcini, 60 I.D. 371 (1949); Park-Premier Mining Company, A-17692 6/ (May 23, 1936).

I do not mean to suggest that in all contests which result in the denial of patent applications on the basis of lack of discovery that the mining claims should be left intact. Rather it is my view that where no active and specific federal program is involved and the land is concededly mineral in character, no useful purpose is served by cancelling the claim and in essence permitting, through sufferance or explicitly, the relocation of the claim. These are the circumstances presented in the case at bar. The net result of the procedure embodied in the main opinion is to force the mining claimant into competition with potential claim jumpers. Concededly, he might be able to continue to prospect under the doctrine of pedis possessio, but the existence of the mining claim helps his posture.

Despite the assumptions the majority opinion makes concerning the statutes of Congress which incorporated the holding of Park-Premier, an examination of the background of those statutes reveals the error into which the majority has fallen.

6/ Erroneously cited in Carlile as A-20241.

I have earlier adverted to 30 U.S.C. § 613(c) (1970), which contains the Act of July 23, 1955, § 5, 69 Stat. 369, as amended, which relates to a sanction of loss of surface rights when a discovery has not been established. Similarly, I have referred to 30 U.S.C. § 527(c) (1970), containing the Act of August 13, 1954, § 7, 68 Stat. 711, as amended, relating to a sanction of loss of leasable minerals where discovery had not been demonstrated.

The majority opinion blithely suggests that Congress, recognizing that discovery is a sine qua non for the existence of a claim, felt it necessary to make deviations from that rule explicit.

But Carlisle was not decided until June 10, 1960, and at the time Congress enacted the Acts of August 13, 1954 and July 23, 1955, Park-Premier still represented the Department's posture in the matter. Unless one believes that the Congress was prescient in 1954 and 1955 as to the Departmental ruling in Carlisle in 1960, one is impelled to the conclusion that Congress was adopting the Park-Premier doctrine and wished to constrain the Department, in the exercise of its discretion from declaring mining claims null and void in those circumstances.

In sum, it is my view that Carlile rests upon an erroneous hypothesis 7/ and its application in the case at bar serves no useful purpose.

_____
Frederick Fishman, Member

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7/ The discussion in Park-Premier Mining Company, supra, in my view correctly states the applicable law:

> [W]here a mineral applicant's right to patent is assailed in proceedings charging lack of discovery, and no public interest, adverse claim, fraud or bad faith is involved, it has been the uniform practice in the Land Department upon a finding that there was no sufficient discovery of mineral on the claim or claims involved, to merely reject the application and cancel the entry. The existence of this practice is shown by numerous reported and innumerable unreported cases. The object of the attack being merely the application for patent, the rejection of the application for want of a discovery that justifies the issuance of a patent accomplishes that object. The Clipper Mining Co. v. The Eli Mining and Land Co. (33 L.D. 660).
>
> * * * * *
>
> While the mere cancelation [sic] of the application does not have the effect of a determination that the claimant company has no valid possession under the mining law, neither does it imply or create the presumption that he has such a possession. It leaves that question undetermined. Considering the showings of the claimant company as to discovery, the finding is not justified that it now has a discovery of mineral that would warrant the issuance of a patent. [Emphasis supplied]